

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROGELIO MORENO-GARCIA,
JASMINE RANGEL, FRANCISCO
MORENO-MAGANA, ANTONIA
GARCIA-MENDOZA, ISRAEL
MORENO-GARCIA, JUVENAL
MORENO-GARCIA, MARIO
GUTIERREZ, AMBER HAWK,
ALFONSO RANGEL, ANTHONY
MAGANA, JUAN DIEGO MORENO-
GARCIA, FRANCISCO MORENO-
GARCIA, and LUIS BARAJAS,

Plaintiffs,

v.

YAKIMA POLICE DEPARTMENT,
L.E.A.D. TASK FORCE OFFICERS
JOHN and JANE DOES 1-30,
CUSTOMS AND BORDER PATROL
OFFICERS JOHN and JANE DOES
1-30, YAKIMA SHERIFF'S
DEPARTMENT OFFICERS JOHN and
JANE DOES 1-30,

Defendants.

NO. CV-09-3123-EFS

**ORDER GRANTING YAKIMA COUNTY
DEFENDANTS' MOTION TO DISMISS**

Before the Court, without oral argument, is Defendant Yakima Sheriff's Department Officers' Motion to Dismiss for Insufficient Service

1 of Process (ECF No. [31](#)). For the reasons set forth below, the Court
2 grants Defendants' motion.

3 I. Background

4 On June 25, 2009, Plaintiff Jasmine Rangel filed a separate
5 complaint in this Court in which she alleged that Defendants unlawfully
6 seized personal property in connection with a drug forfeiture proceeding
7 at four locations in Washington. Although Defendants had a warrant, Ms.
8 Rangel alleged that they seized property not mentioned in the warrant,
9 that she did not receive proper notice, and there is insufficient
10 evidence to show that the articles seized were connected with drug
11 trafficking. Ms. Rangel requested that the Court order Defendants to
12 return the property.

13 On November 6, 2009, Plaintiffs, including Ms. Rangel, filed their
14 Complaint in Yakima County Superior Court. (ECF No. [1](#).) On December 17,
15 2009, Defendants removed this case from Yakima County Superior Court.
16 Plaintiffs allege constitutional violations arising out of the seizure
17 of the same personal property from three of the same locations.¹ In the
18 facts section of the Complaint, they claim damages from injuries to their
19 property that occurred when Defendants unlawfully broke doors to execute
20 the warrants. (ECF No. [1](#) at 20.)

21 On July 12, 2010, the Court dismissed Plaintiffs' claims without
22 prejudice as to Defendants Custom and Border Patrol Officers, John and
23 Jane Does 1-30, Immigration and Custom Enforcement Officers, and Yakima
24

25
26 ¹ The Complaint says that Defendants seized property from four
locations, but lists only three.

1 Police Department for insufficient service of process. (ECF Nos. [26](#) &
2 [28](#).)

3 **II. Discussion**

4 Defendant Yakima Sheriff's Department Officers move under Federal
5 Rule of Civil Procedure 12(b)(5) to dismiss the Complaint because they
6 have not been properly served with the Summons or Complaint. Plaintiff
7 did not respond.² Because the Court finds that service was improper, the
8 Complaint is dismissed without prejudice.

9 **A. Standard**

10 Under Federal Rule of Civil Procedure 12(b)(5), the defense of
11 insufficient service of process must be asserted either by answer or by
12 motion. If asserted by motion, Rule 12(b) states that such a motion
13 "must be made *before pleading* if a responsive pleading is allowed." Fed.
14 R. Civ. P. 12(b) (emphasis added). In this case, Defendants filed their
15 Rule 12(b)(5) motion to dismiss *after* asserting in their Answer (ECF Nos.
16 [5](#) & [7](#)) the defense of improper service.³

17 Courts are split as to whether a Rule 12(b)(5) motion, which is
18 commonly referred to as a "pre-answer" motion, is the proper procedural
19 vehicle for attacking service of process *after* an answer has been
20

21 ² Failure to respond constitutes consent of an adverse order. LR
22 7.1(e).

23 ³ The Court recognizes that because Defendants asserted the defense
24 of insufficient service of process in their Answer, that defense was not
25 waived. Fed. R. Civ. P. 12(h)(1) (recognizing that a party waives the
26 defense of insufficient service of process if it does not assert that
defense in its answer or by pre-answer motion).

1 filed. Several courts have allowed post-answer motions to dismiss based
2 on grounds asserted as defenses in the answer. See *Telesca v. Long*
3 *Island Hous. P'ship*, 443 F. Supp. 2d 397, 405 (E.D.N.Y. 2006); *Molnlycke*
4 *Health Care AB v. Dumex Med. Surgical Prods. Ltd.*, 64 F. Supp. 2d 448,
5 449 n.1 (E.D. Pa. 1999). Other courts insist that post-answer Rule 12(b)
6 motions to dismiss are untimely. See *Augustine v. United States*, 704
7 F.2d 1074, 1075 n.3 (9th Cir. 1983); *Byrne v. Nezhat*, 261 F.3d 1075, 1093
8 n.35 (11th Cir. 2001).

9 Notwithstanding the "before pleading" language of Rule 12(b), the
10 lack of other pretrial procedures for raising an improper service defense
11 suggests that post-answer Rule 12(b) motions should be permitted. Rule
12 12(i) requires courts to hear and decide Rule 12(b)(1)-(7) defenses
13 before trial, whether made in pleading or by motion. Fed. R. Civ. P.
14 12(i). But because the instant motion does not raise a so-called
15 "nonwaivable" defense, it is not properly before the Court as a Rule
16 12(h)(2) or 12(h)(3). See Fed. R. Civ. P. 12(h)(2) & (h)(3) (allowing
17 parties to raise defenses subject-matter jurisdiction, failure to state
18 a claim, or failure to join an indispensable party at any time). And
19 because the motion does not go to the merits of the action, it is not
20 properly brought by a motion for summary judgment. See *United States v.*
21 *Marple Cmty. Record, Inc.*, 335 F. Supp. 95, 101 (E.D. Pa. 1971). Left
22 with no alternative procedural approach, the Court considers the instant
23 motion under Rule 12(b)(5).

24 In considering a Rule 12(b)(5) motion to dismiss, courts must accept
25 as true all well-pleaded allegations in the complaint, but may reference
26 the record to determine the alleged insufficiency of service of process.

1 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1353 (3d. Ed.
2 1998).

3 **B. Motion to Dismiss for Insufficient Service**

4 In order for the Court to exercise jurisdiction over a defendant,
5 the defendant must be served properly. *Omni Capital Int'l, Ltd. v.*
6 *Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). The plaintiff has the
7 burden of showing that service of process was sufficient. *Wells v. City*
8 *of Portland*, 102 F.R.D. 796, 799 (D. Or. 1984). A plaintiff serving a
9 local government must either deliver a copy of the summons and complaint
10 to the government's chief executive officer or accomplish service under
11 the state's law. Fed. R. Civ. P. 4(j)(2). A plaintiff serving
12 individuals must follow state law for serving a summons in an action
13 brought in courts of general jurisdiction in the state where the district
14 court is located or where service is made. *Id.* at 4(e)(1).

15 Under Washington Civil Rule (CR) 4(d)(1) and (2), the summons and
16 complaint must be served together and in accordance with RCW 4.28.080.
17 RCW 4.28.080 provides that a plaintiff must serve an individual defendant
18 "personally, or by leaving a copy of the summons at the house of his or
19 her usual abode with some person of suitable age and discretion"
20 RCW 4.28.080(15). If an individual cannot be located in this manner,
21 service may be completed "[b]y leaving a copy at his or her usual mailing
22 address with a person of suitable age and discretion who is a resident,
23 proprietor, or agent thereof, and by thereafter mailing a copy by first-
24 class mail" *Id.* at (16).

25 A plaintiff must effect service within 120 days after the complaint
26 is filed. *Id.* at 4(l), 4(m). Washington law requires a plaintiff to

1 file the complaint and then serve the summons and complaint within ninety
2 (90) days for purpose of tolling the statute of limitations. RCW
3 4.16.170. Under both federal and Washington law, a plaintiff must submit
4 an affidavit asserting that service was accomplished.

5 Plaintiffs' attempt at serving Defendant Yakima Sheriff's Department
6 Officers was insufficient. Plaintiffs attached to the end of the initial
7 Complaint a "Proof of Service & Declaration" signed by Daniel Marc-Roland
8 Cortier. (ECF No. 1 at 13.) This document indicates that a copy of the
9 Complaint was sent by first class mail to the Yakima Police Department,
10 Yakima Prosecutor's Office, L.E.A.D. Task Force in Zillah, Washington,
11 and United States Customs and Border Patrol and Immigration and Custom
12 Enforcement Offices in Washington, D.C. *Id.* Nowhere in the record is
13 there any evidence that Plaintiffs attempted to serve Defendants Yakima
14 Sheriff's Department Officers either individually or collectively.

15 Because more than ninety days have passed since Plaintiffs filed
16 their Complaint in Yakima County Superior Court, and more than 120 days
17 have passed since Plaintiffs' Complaint was removed to this Court,
18 Plaintiffs have failed to complete service upon Yakima Sheriff's
19 Department Officer Defendants. And because Plaintiffs did not timely
20 respond to Defendants' motions, the Court may assume they consent to
21 dismissal.⁴ LR 7.1(e).

22 **III. Conclusion**

23
24 ⁴ On August 20, 2010, the Court notified Plaintiffs, as a pro se
25 litigants, that their "failure to file a response [would] constitute
26 [their] consent to the Court, granting the motion." (ECF No. 34 & 35.)

1 For the foregoing reasons, **IT IS HEREBY ORDERED:**

2 1. Yakima Sheriff's Department Officers Defendants' Motion to
3 Dismiss for Insufficient Service of Process (ECF No. 31) is **GRANTED**.
4 Plaintiffs' Complaint (ECF No. 1) is **DISMISSED without prejudice** as to
5 Defendants Yakima Sheriff's Department Officers John and Jane Does 1-30.

6 2. **Judgment** is to be entered in favor of Defendants Yakima
7 Sheriff's Department Officers John and Jane Does 1-30s.

8 3. **Within thirty (30) days of the date of this Order**, Plaintiffs
9 shall show cause as to how the only remaining Defendant, L.E.A.D. Task
10 Force, has properly been served. If Plaintiffs fail to do so, the Court
11 will dismiss the L.E.A.D. Task Force Defendants, strike all hearings and
12 pending deadlines, and close this file.

13 **IT IS SO ORDERED.** The District Court Executive is directed to enter
14 this Order and to distribute copies to Plaintiff and counsel.

15 **DATED** this 27th day of October 2010.

16
17 s/Edward F. Shea
18 EDWARD F. SHEA
United States District Judge

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